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IN THE

Supreme Court of the United States

October Term, 1957

No. 922

AMERICAN EXPORT LINES, INC., as Owner of S/S EXMOUTH,

Petitioner,

THOMAS KENWORTHY'S SONS, et al.,

Cargo Intervenors,

against

S/S HELLENIC BEACH, her engines, boilers, etc., and HELLENIC LINES, LTD.,

Respondent.

HELLENIC LINES, LTD., Owner of S/S HELLENIC BEACH,

Respondent,

against

S/S EXMOUTH, her engines, boilers, etc., and AMERICAN EXPORT LINES, INC.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KENNETH GARDNER,
Counsel for Petitioner.

JAMES M. ESTABROOK,
WALTER A. DARBY, JR.,
of Counsel.

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Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled consolidated cases on January 15, 1958.

Citations to Opinions Below

The opinion of the District Court (R. 282) printed in Appendix A hereto (p. 13) is reported in 134 F. Supp. 546. The opinion of the Court of Appeals (R. 140a) reversing the opinion of the District Court is not yet reported and is printed in Appendix B hereto (p. 23).

Jurisdiction

The judgment of the Court of Appeals was entered on January 15, 1958 (R. 153a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Where the question of liability as between two ships involved in a collision has first been determined by a jury who heard the testimony and observed the witnesses and secondly been determined by a District Court Judge who also heard the testimony and observed the witnesses, may the Court of Appeals disregard these previously determined issues and reverse the decision?

2. May the Court of Appeals reverse on the facts two separate findings by the District Court, one also by a jury, that the violation of the Rules of the Road by the Hellenic Beach contributed to the collision?

3. May the Court of Appeals overrule the Supreme Court by mitigating the effect of a statutory violation by a colliding vessel?

4. May the Court of Appeals rely on the testimony of a witness not believed by the District Court?

Statutes Involved

The statutes involved are 33 U. S. Code 112, 33 U. S. Code 121, Rule 54(c) of the Federal Rules of Civil Procedure; 28 U. S. Code and Rule 52(a) of the Federal Rules of Civil Procedure which are set forth in fail as follows:

32 U. S. Code 112 (International Rule 27). In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

33 U. S. Code 121 (International Rule 29). Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Federal Rule of Civil Procedure 54(c), 28 U. S. Code. Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Federal Rule of Civil Procedure 52(a). In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard

shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement

On June 5, 1949, shortly after two o'clock in the morning, the s/s Hellenic Beach, owned and operated by Hellenic Lines, Ltd., collided with the s/s Exmouth, owned and operated by American Export Lines, Inc., near the entrance to Delaware Bay.

The Exmouth was proceeding in a westerly direction. The course of the Hellenic Beach was about southeast by east, so the vessels were in a crossing situation with the Hellenic Beach on the Exmouth's starboard bow.

While under the Rules of the Road (International Rule 19, 33 U. S. C. 104), the Exmouth was the burdened vessel in a crossing situation and had the obligation to keep out of the way of the Hellenic Beach; nevertheless the Hellenic Beach also had the obligation to navigate with due regard to all dangers of collision and to observe precautions required by ordinary practice of seamen. As the vessels approached one another the Hellenic Beach Captain saw the Exmouth about a mile and a quarter away and saw that a crossing situation existed (R. 43). In spite of this situation, the Master of the Hellenic Beach waited until the vessels were one-half mile apart (R. 62) and then blew a one-whistle signal which under International Rule 28 (33 U. S. C. 113) means:

"I am directing my course to starboard."

In spite of this whistle signal, the Hellenic Beach made no change of course but continued on her course at full speed (R. 63).

When the vessels were about one-quarter of a mile apart, the Hellenic Beach blew another one-blast signal (R. 59). At this time, the Hellenic Beach still had not reduced her speed, nor altered course in accordance with her own signal, when it was apparent that, if she had maneuvered in accordance with her own signals, she would have avoided the collision. Nevertheless, although the vessels were then *in extremis*, the Master of the Hellenic Beach did nothing to avoid a collision until he heard a two-blast signal from the Exmouth, and then he ordered his helm hard right and signalled for full astern (R. 45).

This was twice found once by a jury in the Southern District of New York and again by the judge in the Eastern District of New York to be a violation of the rules contributing to the collision.

A seaman, on board the Exmouth, Miguel Rivera, was injured in the collision. He brought an action in the United States District Court for the Southern District of New York against American Export Lines, Inc., and Hellenic Lines, Ltd. His complaint (R. 109a) set forth identical causes of action against American Export Lines, Inc., and Hellenic Lines, Ltd., i.e.:

> "* * * that said collision was the result of the carelessness and negligence of the defendants, American Export Lines, Inc., and Hellenic Lines, Ltd., and the officers and fellow seamen of the plaintiff on board the SS EXMOUTH and the officers and seamen on board the SS HELLENIC BEACH in failing to properly control, maneuver and navigate their respective vessels as they approached each other, so as to prevent said vessels from coming into collision with each other * * *."

The answer of Hellenic Lines, Ltd., and the answer of American Export Lines, Inc., were identical in setting forth affirmative defenses claiming indemnity from each other with respect to Rivera's claim (R. 116a and 120a).

Prior to the trial of the *Rivera* action, the proctors for the Hellenic Lines had pressed for the admission of certain testimony, taken in the case at bar, into the proceedings of the *Rivera* case. It was the contention of Hellenic Lines proctors that the issues were identical in the personal injury case and the collision case. Judge Leibell of the United States District Court for the Southern District of New York, in his opinion, *Rivera* v. *American Export Lines, Inc., and Hellenic Lines, Ltd.*, 13 F. R. D. 27, 28 (S. D. N. Y. 1952), stated in allowing the use of this testimony:

> "The same set of facts and circumstances operated to bring about the collision, which resulted in damage to the vessels and the injuries to the plaintiff."

The jury heard the evidence as presented by the witnesses for both vessels. A pre-trial order consented to by Hellenic Lines, Ltd. presented as one of the issues the question of the faulty navigation of the Hellenic Beach. The same facts and circumstances operated to bring about the one collision which resulted in both damages to the vessels and injuries to the plaintiff.

The jury, upon hearing the evidence, found and determined that both vessels were at fault and a verdict was so entered. Neither defendant appealed.

Subsequently the issue of collision was tried in Admiralty in the United States District Court for the Eastern District of New York. There the Hellenic Beach master testified in person. The District Court found his testimony was not creditable (R. 290). The trial court found independently that both vessels were at fault and also stated in his opinion, regardless of his independent finding, that the decision of the jury would have been dispositive of the matter (R. 202).

The findings of the District Court were reversed on appeal to the Circuit Court of Appeals for the Second Circuit and this Petition for a Writ of Certiorari is made herewith.

Reasons for Granting the Writ

1. The decision of the Court below is in direct conflict with the decisions of this Court: *Commissioner* v. *Sunnen*, 333 U. S. 591 (1947); *Heiser* v. *Woodruff*, 327 U. S. 726, 60 S. Ct. 853, 90 L. Ed. 970; *Partmar Corporation, et al.* v. *Paramount Pictures Theatres et al.*, 347 U. S. 89, 74 S. Ct. 414, 98 L. Ed. 532, which held that matters which were actually litigated and determined between the parties cannot later be relitigated. In the *Rivera* case, the sole issue to be considered by the jury, aside from damages, if any, to be awarded to the plaintiff, was to determine if either, or both, of the vessels were at fault. In order for either vessel owner to escape liability, it was necessary to prove the fault of the other vessel.

Chief Judge Clark of the Court below recognized the obvious merit of this when he stated in his dissenting opinion (R. 149a):

> "In addition, the prior verdict and judgment in Rivera v. American Export Lines, Civ. No. 53-207, D. C. S. D. N. Y., May 2, 1952, clearly established the Hellenic's negligence, and that finding should be *res adjudicata* in this case."

Chief Judge Clark also recognized that the majority opinion completely disregarded the expressed intent of the Federal Rules of Civil Procedure, particularly Rule 54(c) which states its purpose to be that " * * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings." Judge Clark is a leading expert in Federal Judicial Procedure. He taught pleading and procedure and has written extensively on the subject, Who's Who in America, 1956-57, p. 475. He has been a member of and reporter for this Court's advisory Committee on Federal Civil Procedure since it was organized in 1935. His appointment was presumably in recog-

nition of his learning in this field and of the articles on "Federal Civil Procedure" which he and Professor Moore, author of Federal Practice, published at 44 Yale L. J., 387, 1921. In the *Rivera* case, each defendant (American Export Lines, Inc., and Hellenic Lines, Ltd.) pleaded the other's negligence in the answers, adding "and if any liability for such damage should be adjudged against defendant" then indemnity should be granted against the other defendant. The answers of the two defendants in the *Rivera* case set the parties as adversaries. The pleadings were such as to more than come within the scope of Rule 54(c). In *Esso Standard Oil Co.* v. *United States, et al.*, 174 F. 2d 182 (C. C. A. 2), the same lower court held that:

> "We may add that the equitable treatment of parties by courts of admiralty and the early abandonment in equity of the former requirement that a claim to affirmative relief be set up in a cross-bill makes us unwilling to treat the situation here as a mere matter of formal pleading. Corcoran v. Chesapeake & Ohio Canal Co., 94 U. S. 741, 24 L. Ed. 190."

As a result, the Court allowed an answer to act as a cross-libel.

When Chief Judge Clark stated that, in his opinion, the *Rivera* case was dispositive of the instant case it would be a little too much to think that Judge Clark did not know what he was doing.

That certain defenses in the *Rivera* case, such as the major-minor fault rule, were not raised is not a bar to the conclusiveness of the collateral estoppel for as the Restatement of Judgments (1942) points out, § 68, page 300:

> "The failure of the defendant to interpose a defense in the prior action which resulted in a judgment against him, precludes him it is true, from relying upon that defense thereafter in so far as the same cause of action is concerned."

It is apparent from the decision of the Circuit Court of Appeals, that it ignored the clear intent of the Federal Rules of Civil Procedure, the decisions of the Supreme Court and a principal basis of American jurisprudence that an issue having been tried, it cannot be relitigated.

The issues in the instant case having been twice tried, once by a jury in the *Rivera* case, and once by the District Court for the Eastern District of New York, the Appellate Court cannot consider the weight of the evidence, but must limit itself to the correction of errors of law. The issues having been twice tried, the reviewing court cannot search the record to determine conflicting claims, or which of conflicting theories is correct. As the United States Court of Appeals, Ninth Circuit, succinctly stated in *Farley* v. *United States of America*, 252 F. 2d 85:

> "Trials *de novo* in admiralty on appeal, in discard for many years expired with *McAllister* vs. *United States*, 348 U. S. 19."

2. The jury in the *Rivera* case found that the Hellenic Beach was liable for faulty navigation and held her 50% at fault. The District Court independently found the Hellenic Beach guilty of faulty navigation, specifically of violating International Rules, Articles 27 and 29 (33 U. S. C. sections 112 and 121 respectively) (R. 289).

In *The Pennsylvania*, 86 U. S. 125, 136, this Court stated the rule to be:

> "• • • the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

Both the jury in the *Rivera* case and the Judge in the District Court found, after hearing and observing the witnesses, that the Hellenic Beach not only was at fault but

had failed to sustain the burden of proving that her fault did not contribute to the collision.

It is submitted that the Court of Appeals exceeded the powers of an appellate tribunal when it substituted its findings of fact over the findings of two lower courts of competent jurisdiction.

3. The statutory fault of the Hellenic Beach was found by the jury in the *Rivera* case, was found by the judge in the trial in the District Court and then completely disregarded by the Court of Appeals which, without the benefit of hearing or observing the witnesses, stated that the evidence was clear that the Hellenic Beach was free from fault.

This Court in *Kernan, Administrator* v. *American Dredging Co.*, 355 U. S. 426, held that a violation of a rule of navigation created liability without negligence.

Chief Judge Clark, in his dissenting opinion (R. 149a), recognized that the "court below, obviously in a much better position than we to judge the credibility of the testimony, determined that the navigator of the Hellenic depended unjustifiably on the expected action of his opposite number and continued without slackening speed after he was or should have been aware of the danger."

The Court of Appeals in its decision, without a full appreciation of the testimony in two lower courts of competent jurisdiction, not only mitigated the effect of a statutory violation (33 U. S. Code 112 and 33 U. S. Code 121) but disregarded it entirely.

4. The testimony of the master of the Hellenic Beach was read into evidence in the *Rivera* case and the jury didn't believe it and found the Hellenic Beach at fault. The master of the Hellenic Beach was flown from his then command to testify at the trial in Admiralty in the District Court (R. 52). The judge after hearing his testimony and

observing his demeanor on the stand did not believe his testimony (R. 290).

In the face of this clear mandate from the two lower courts of competent jurisdiction, the majority opinion of the Court of Appeals relying entirely upon the testimony of this discredited witness, reversed the decision. Clearly this is error. *McAllister* v. *United States*, 348 U. S. 19; *Ferguson* v. *Moore McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH GARDNER,
Counsel for Petitioner.

JAMES M. ESTABROOK,
WALTER A. DARBY, JR.,
of Counsel.

Appendix A

(Opinion of Rayfiel, *D. J.*)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

—o—

A. 19244

HELLENIC LINES, LTD., owner of SS HELLENIC BEACH,
Libelant,

vs.

SS EXMOUTH, her engines, boilers, etc., and AMERICAN EXPORT LINES, INC.,
Respondents.

A. 19486

AMERICAN EXPORT LINES, INC., as Owner of the SS EXMOUTH,
Libelant,

vs.

SS HELLENIC BEACH, her engines, boilers, etc., and HELLENIC LINES, LTD.,
Respondents.

—o—

Appearances:

DOW and SYMMERS, Esqs., Proctors for Hellenic Lines, By WILBUR E. DOW, JR., Esq., Advocate.

HAIGHT, DEMING, GARDNER, POOR and HAVENS, Esqs., Proctors for American Export Lines, By JAMES M. ESTABROOK, Esq., and WALTER DARBY, Esq., Advocates.

BIGHAM, ENGLAR, JONES and HOUSTON, Esqs., Proctors for Petitioners, By CHARLES A. VAN HAGEN, JR., Esq., Advocate.

Before: Rayfiel, *J.*

Shortly after 2:00 A. M., on June 5, 1949, a collision took place between two vessels, the "Exmouth" and the "Hellenic Beach" in the vicinity of Overfalls Lightship, at the mouth of Delaware Bay. The "Exmouth" was bound from New York to Philadelphia, with 300 tons of cargo aboard; the "Hellenic Beach" was bound from Philadelphia to New York, and was carrying 5000 tons of cargo.

The "Hellenic Beach" filed a libel against the "Exmouth", which, in turn, filed its cross libel. The owners of the cargo on board the "Exmouth" intervened, and the parties stipulated "That if the suit and the cross suit between the owners of the SS Exmouth and the SS Hellenic Beach should result in a decision of sole fault on the part of the Hellenic Beach, or mutual fault on the part of both vessels, that the cargo intervenors shall be entitled to an appropriate interlocutory decree in their favor * * *."

The "Exmouth" was a vessel of the type known as a Victory ship. She was 439 feet long, with a beam of 63 feet. Her engines developed 8500 horsepower, which gave her a maximum speed of about 17 knots. The "Hellenic Beach" was of the type known as a Liberty ship. She was 422 feet long, with a beam of 57 feet. Her engines developed 2500 horsepower, which gave her a top speed of about 10½ knots.

While it had been foggy earlier that night, the visibility at the time of the collision was about five miles. There was some wind, a slight swell, and the tide was at flood, running northwest at over two knots.

The "Exmouth" had run into the fog earlier that night, and had anchored about a mile southwest of Overfalls Lightship. At about 1:42 A. M., the fog having lifted, she heaved up anchor. At about 1:51 A. M. she was under way at her full maneuvering speed, which was about 12 knots, and proceeded on a course of about 285 degrees past the Overfalls Lightship. Her master, Captain Eeklund, was on her bridge, directing her navigation. With him were the

third mate, Bernard E. Griffin, who was the officer on watch, and Whitney, the helmsman. The first officer and a lookout man were at the bow, acting as lookouts.

The "Hellenic Beach" had dropped her pilot at 1:50 A. M. At 1:52 A. M. the order was given for full speed ahead, and she proceeded on a course of 124 degrees true to pass Overfalls Lightship on her left. She was being navigated from her flying bridge by Captain Macris, her master. With him were the second mate and a helmsman. A lookout was stationed on the forecastle.

Captain Ecklund testified that just as he passed the Lightship he ordered the helmsman to swing left to 311 degrees, and then went into the chartroom for a few seconds. When he emerged from the chartroom he saw a vessel which proved to be the "Hellenic Beach". He observed her masthead light, range light and red port side light bearing about 45 degrees on his starboard bow, and about a mile off. He stated that he ordered the helmsman to swing hard left, and he blew two sharp blasts of the whistle, thinking that the vessels would cross port to port. Instead of carrying out his order the helsman said "You mean right captain," and the third mate (Griffin) said "hard right, hard right" (S. M. p. 117), which Captain Ecklund testified that he did not want, and ordered the helmsman to go hard left, with which order he complied. At that point the "Hellenic Beach" was bearing down on the "Exmouth" which, almost immediately thereafter, she struck at the Number 4 Hold.

Griffin, the "Exmouth's" third mate, called as a witness by the "Hellenic Beach", testified that shortly after the "Exmouth's" anchor was heaved up and she was proceeding at full maneuvering speed, steadied on a course of 290 degrees, he saw the lights of another vessel (the "Hellenic Beach") which was coming down from the direction of the pilot station. He estimated she was then about three of four miles from the "Exmouth". He stated that he saw her masthead, range and red port side lights; that there-

after the "Exmouth" passed the Lightship about a quarter of a mile off, and her heading was then approximately 285 degrees; that the other vessel ("Hellenic Beach") was about a mile or two away, about 45 degrees on her starboard bow; that he had called Captain Ecklund's attention to the other ship before they had passed the Lightship; that after they had passed it Captain Ecklund ordered a change of course left to 317 degrees, to which the helmsman relied: (S. M. p. 170) "You mean right captain", and that he, Griffin, then added: "Yes, that's right, you will have to come to the right". Griffin testified, further, that Captain Esklund repeated the command to come hard left, and the helmsman obeyed the order; that at that time the ships were only half a mile apart; that he (Griffin) then went into the chartroom to check the course, and ascertained that the change of course should have been to the right, instead of the left; that he told this to Captain Ecklund, who then ordered the helmsman to come right, but the vessels were then less than 50 yards apart; that the master blew the two blasts on the whistle and gave the "hard right" order, but the collision ensued.

There is no dispute that under the then existing circumstances and conditions the "Exmouth" was the burdened vessel and the "Hellenic Beach" the privileged one, for at page 21 of their brief, the proctors for the former admit that she (the "Exmouth") "unquestionably was in open and apparent violation of International Rule 19 which states 'when two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other' ". The "Exmouth" not only failed to keep out of the way of the "Hellenic Beach" in clear violation of Rule 19, supra, (33 U. S. C. sec. 204) but her master navigated her in such a faulty manner as to make the collision inevitable. There was testimony to the effect that Captain Ecklund was intoxicated during his aforementioned supervision of the

navigation of the "Exmouth" but, regardless of the cause of his faulty navigation, there appears to be no doubt that he operated the "Exmouth" in clear violation of International Rule 19 (33 U. S. C. sec. 204).

Let us see what those charged with the navigation of the "Hellenic Beach" were doing all this time. Captain Macris, her master, testified that sometime after she dropped her pilot he saw two masthead lights and a green light of a vessel, which later proved to be the "Exmouth" from two to four points on his port bow, at a distance of about a mile and a half, and that he expected the vessel to turn right while he maintained his course and speed. As he said, (page 27 of the minutes of the trial) "Under the rules I had to hold my course and speed, and the other ship had to turn right and show me the red light after I showed it to her." He stated, further, that he blew a one-blast signal when he was less than a mile away, but that there was no answer from the "Exmouth"; that at three quarters of a mile he blew another one-blast signal, and the "Exmouth" responded with a two-blast reply; that at about that point he sensed that there was danger of a collision, put his helm hard right, and signalled to the engine-room for full speed astern. The order was carried out, but almost immediately thereafter the collision took place.

On cross examination he was questioned concerning his testimony taken by deposition on June 14, 1949, nine days after the accident and admitted that he then testified as follows:

(S. M. p. 50)

"Q. I shall read to you now from page 11:

"Q. Did you blow any whistles? A. I little while later when I first thought the distance was shorter and she did not change course as she had to I blew my whistle one blast. I wanted to tell her to keep out of my way'.

Q. Do you remember being asked that question and making that answer? A. Yes.

Q. Do you remember being asked this question:

'Q. How far away was she at that time, about? A. A little more than half a mile.' Do you remember that? A. If I said so I admit it."

A sketch was then offered and received in evidence, marked Respondents' Exhibit "C", showing the position of the two vessels, and containing these words in Captain Macris' handwriting: "Approximate distance one half mile" (S. M. p. 52)

The cross examination continued: (S. M. p. 52): "Do you remember on cross examination being asked this question, and I read to you now from page 25, about three-quarters of the way down:

'Q. At that time how far were you from the Exmouth in your opinion? A. About when, the second blast? "Q. When you sounded your second one-blast signal? A. May be a quarter of a mile'.

Do you remember being asked those questions and making those answers? A. If it is there, yes."

And further, at page 53 of the minutes of the trial:

"Q. Now on page 26 of your deposition I read to you and ask you if you remember being asked this question:

'Q. I think you said that your best estimate was then about a quarter of a mile, "and you were discussing then the distance between the ships at the second one blast signal, and you said: 'A. Yes, about a quarter of a mile when I blew the second blast'.

Do you remember being asked that question and making that answer? A. I don't remember but maybe I said it."

Following is further testimony of Captain Macris (S. M. p 54):

"Q. Now, captain, you testified before the Coast Guard, did you now? A. Yes, sir.

Q. And that was on June 8, three days after the collision? A. Yes.

Q. Your recollection was still better then, wasn't it, than it was at the time of the deposition? A. Yes.

* * *

Q. Were you asked these questions at that time:

'Q. Coming to the first one-blast signal, how far were you apart? A. Perhaps half a mile.

Q. What was the bearing of your ship then, was she still on the same position on your bow? A. Yes, in the same position on my port bow, maybe three points.

Q. In other words, the bearing of your ship had not changed any? A. I had no time to take bearings.

Q. I am speaking of your estimation watching the ship. You did not consider the bearing to be changed? A. Yes.

Q. She remained on your starboard bow showing her green light? A. Yes. (counsel agreed that there was an error in the transcription of the word "starboard" in the last question; it should have read "port".)

Q. That is the time you blew one blast? A. That is right.

Q. You were about a half a mile apart. A. Yes.'

Do you recall that testimony, Captain? A. Yes.

Q. Was it correct? A. Everything that is in there is correct as to what I say." (matter in parenthesis added)

The "Hellenic Beach", as the privileged vessel, was required, under Article 21 of the International Rules (33 U. S. C. sec. 106), to "keep her course and speed," and had the right to expect the "Exmouth" as the burdened vessel, to keep out of her way, as she was obliged to do under Article 19 of the International Rules (See U. S. C., sec. 104) C. F. Marsden's Collisions at Sea (9th Ed., 934) pp. 375-380; Le Boyteaux, Rules of the Road at Sea (1920) p. 133. But the "Hellenic Beach" was likewise bound by the International Rules, Articles 27 and 29 (33 U. S. C. sections 112 and 121, respectively) which reads as follows:

Article 27 "In obeying and construing these rules, due regard shall be had to all dangers of navigation and col-

lision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Article 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout,, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Did Captain Macris, in his navigation of the "Hellenic Beach", exercise the care, prudence and judgment required of him under Articles 27 and 29, supra? In my opinion he did not. His testimony at the Coast Guard hearing and at the taking of his deposition, both of which occurred shortly after the collision, when his recollection of the events in question was undoubtedly more vivid than it was at the trial, more than five years thereafter, satisfies me that the "Hellenic Beach" and the "Exmouth" were only half a mile apart when the former sounded her first one-blast signal and only a quarter of a mile apart when the second was sounded, immediately after which Captain Macris heard the "Exmouth's two-blast signal and ordered his vessel's helm hard right and her engines full astern. It must be noted that the vessels were approaching each other at a combined speed of over twenty knots, at night, and at a time when, by his own admission, it was difficult to judge distances. In my opinion the master of the "Hellenic Beach" was guilty of a navigational fault when he failed to take affirmative action when the vessels were only half a mile apart. Instead of sounding a one-blast signal at that time, as he did, he should have realized that the situation confronting him was fraught with imminent danger, and should have sounded the danger signal and ordered her engines full speed astern.

Captain Macris' testimony (pages 28 and 29 of the S. M. of the trial) amply supports the conclusion that when

the second one-blast signal was sounded the vessels were in extremis, and yet he did nothing to avoid the collision which was then so imminent.

Proctors for the "Exmouth" argue that the decision in the case of Rivera vs. American Export Lines, Inc., and Hellenic Lines, Inc., owners, respectively, of the "Exmouth" and the "Hellenic Beach", holding both vessels at fault, is determinative of the case at bar. In that case, brought in the Southern District of New York, Rivera, a member of the crew of the "Exmouth" sued the owners of both vessels to recover damages for personal injuries which he sustained as the result of the aforementioned collision. He recovered a judgment of $90,000 against both defendants.

Proctors for the "Hellenic Beach" contend, on the contrary (1) that the issues in the Rivera case, differed from those in the instant case, and (2) that as a result of a conference in the Rivera case, held before Judge Irving R. Kaufman, and called for the purpose of attempting to effect a settlement thereof, a stipulation was entered into providing that the decision in the case at bar would serve to determine the Rivera case. The second point of contention may be dismissed without discussion since the Rivera case was not settled. It went to trial and judgment, and a verdict was rendered against both defendants for $90,000.00 half which was paid by each defendant. No appeal was taken.

The "Hellenic Beach" proctors' first contention, to wit, that the issues in the Rivera case and the instant case are not the same, is inconsistent with the position which they took at a pre-trial conference before Judge Leibell in the Rivera case, in which they sought to use certain depositions taken in the case at bar. In his decision (13 F. R. D. 27) Judge Leibell said, at page 28: "*Rivera and Hellenic contend that the issues as to liability are identical in the two actions and that for that reason the deposition, should be received in evidence in this action.*" and, at page 29, "The memoranda submitted by counsel indicate that the same

negligence that resulted in plaintiff's injuries allegedly caused the damage to the vessels. *The same set of facts and circumstances operated to bring about the collision, which resulted in damage to the vessels* and the injuries to the plaintiff." (Emphasis added.)

It is apparent that Judge Leibell agreed with the argument advanced by the proctors for the "Hellenic Beach" in that case, for, in granting the application for leave to use the depositions, he said at page 30: "The answers of the respective defendants (the parties herein) each assert a claim over against the other for indemnity; *their interests are clearly antagonistic, to the same extent as if one were suing the other.* Under those circumstances there appears to be no good reason for denying to Hellenic Lines the right to use the depositions as part of Hellenic's proof against Export in this Rivera action." (emphasis and matter in parenthesis added) It would appear, then that the verdict in the Rivera case is dispositive of the issues in the case at bar.

In view of the foregoing I find both vessels at fault. The intervening cargo owners are entitled to an interlocutory decree in their favor.

Submit findings of fact, conclusions of law and decree in conformity herewith.

Dated: September 28, 1955.

/s/ J. RAYFIEL,
United States District Judge

Appendix B

(Opinion of United States Court of Appeals, for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26—October Term, 1957.

(Argued October 10, 1957 Decided January 15, 1958.)

Docket No. 24518

HELLENIC LINES, LTD., owner of S. S. Hellenic Beach,
Libelant-Appellant.

—v.—

S. S. EXMOUTH, her engines, boilers, etc., and
AMERICAN EXPORT LINES, INC.,
Respondents-Appellees.

AMERICAN EXPORT LINES, INC., as owner of S. S. Exmouth,
Libelant-Appellee.

THOMAS KENWORTHY'S SONS, et al.,
Cargo Intervenors.

—v.—

S. S. HELLENIC BEACH, her engines, boilers, etc.,
and HELLENIC LINES, LTD.,
Respondents-Appellants.

Before:

CLARK, Chief Judge, and LUMBARD and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York, Leo F. Rayfiel, *Judge*.

In Admiralty.

Libel filed by Hellenic Lines, Ltd., against S. S. Exmouth, her engines, boilers, etc., and American Export Lines, Inc. for damages resulting from a collision between the S. S. Hellenic Beach and the S. S. Exmouth. Thomas Kenworthy's Sons, *et al.*, as cargo intervenors, filed a petition of intervention. American Export Lines, Inc. filed a cross-libel against the S. S. Hellenic Beach and Hellenic Lines, Ltd. From a decree, 134 F. Supp. 546, directing that Hellenic Lines, Ltd. recover from the S. S. Exmouth, *in rem*, and/or American Export Lines, Inc., *in personam*, one-half of its damages including one-half of whatever amount it had to pay to the cargo intervenors; that American Export Lines, Inc. recover from the S. S. Hellenic Beach, *in rem*, and/or the Hellenic Lines, Ltd., *in personam*, one-half of its damages; and that Thomas Kenworthy's Sons, *et al.* recover from the S. S. Hellenic Beach, *in rem*, and/or Hellenic Lines, Ltd., *in personam*, their cargo damages, the libelant appeals.

Reversed.

Wilbur E. Dow, Jr., New York, N. Y. (Raymond W. Mitchell, Sonya I. Livshin, and Dow & Stonebridge, New York, N. Y., on the brief), *for Libelant-Appellant, Hellenic Lines, Ltd., owner of S. S. Hellenic Beach.*

James M. Estabrook, New York, N. Y. (Kenneth Gardner, Walter A. Darby, Jr., and Haight, Gardner, Poor & Havens, New York, N. Y., on the brief), *for Respondent-Libellant-Appellee, American Export Lines, Inc.*

Charles A. Van Hagen, Jr., New York, N. Y. (Bigham, Englar, Jones & Houston, New York, N. Y., on the brief), *for Cargo Intervenors-Appellees, Thomas Kenworthy's Sons, et al.*

MOORE, *Circuit Judge*:

Shortly after two o'clock in the morning of June 5, 1949 the S. S. Hellenic Beach, owned by Hellenic Lines, Ltd. (libelant-appellant, referred to as "Hellenic"), collided near the entrance to Delaware Bay with the S. S. Exmouth, owned by American Export Lines, Inc. (respondent libelant-appellee, referred to as "Exmouth").

A libel was filed by Hellenic against Exmouth and a cross-libel filed by Exmouth against Hellenic. In their respective answers Hellenic and Exmouth each accused the other of being at fault. Upon the trial, Thomas Kenworthy's Sons, *et al.*, cargo intervenors, obtained a stipulation that they would be entitled to an interlocutory decree for damage to cargo (some 300 bales of rock wool) on board the Exmouth should the court hold that Hellenic was solely at fault or that there was mutual fault. The trial court held both vessels at fault. From an interlocutory decree adjudging that Hellenic and Exmouth each recover one-half of their respective damages, including cargo damages, against the other, Hellenic and Exmouth appeal.

Hellenic is a Liberty ship, gross tonnage 7207 tons, 2500 horsepower and a maximum speed of $10\frac{1}{2}$ to 11 knots. Exmouth is a Victory ship, 8500-ton class and a maximum speed of some 17 knots. Hellenic was carrying a cargo of 5,000 tons of grain and 300 tons of general cargo; Exmouth had about 133 tons of cargo on board.

Less than a half hour before the collision Exmouth, bound from New York to Philadelphia, was anchored because of fog approximately one and one-half mile southeast of Overfalls Lightship near the entrance of Delaware Bay. At about ten minutes before 2:00 A. M. she weighed anchor and proceeded in a westerly direction passing the lightship about one-quarter mile south. At approximately the same time Hellenic, which had stopped to drop its river pilot at a point some 1.4 miles in a northwesterly

direction (290° true) from the lightship, resumed its course (124° true) towards the ocean. Prior to the collision each vessel observed the lights and the course of the other although there is a fairly substantial difference in the estimate of the miles they were apart at the time. Visibility was about five miles and there was a northwesterly tidal current of over two knots.

On the bridge of Hellenic were the master, the second mate and the helmsman. The Hellenic observed the masthead lights and the green starboard light of Exmouth about 2 to 4 points on her port bow. On the bridge of Exmouth were the master, the third mate and the helmsman. The Exmouth observed the lights of Hellenic which was showing its red port light about 4 points on the starboard bow.

Under the rules of the road Hellenic was clearly the privileged vessel (Art. 19, 33 U. S. C. A. § 204). Exmouth was the burdened vessel and under a duty to keep clear of Hellenic and to give way. On the trial the Exmouth Captain himself admitted that "the Exmouth had to keep out of the way, we were the burdened vessel," and Exmouth's third mate said that the rules required Exmouth "To give way, to stop engines or to reverse." She engaged in none of these operations but continued on at a speed of 15½ to 16 knots.

As the vessels approached each other the Hellenic blew one blast when the ships were about one-half mile apart signifying a port-to-port passing. This signal being unanswered by Exmouth, Hellenic blew another blast when they were about one-quarter of a mile apart. Exmouth then blew two blasts. Because of this cross-signal Hellenic put her helm hard right and her engines full astern. There was also testimony that she blew several short blasts as an alarm signal. Exmouth continued on without slackening her speed and while crossing Hellenic's bow was struck by Hellenic somewhat abaft her beam in the vicinity of Exmouth's number 4 hold, at an angle estimated at about

110°. Although Hellenic's bow cut into Exmouth's side the ships did not lock and Hellenic fell off astern of the Exmouth.

After Hellenic was sighted by Exmouth there was considerable confusion on Exmouth's bridge. Being the burdened vessel it was Exmouth's duty to keep clear of Hellenic. Had Exmouth veered to the right in a northerly direction a port-to-port passing could have been effected. This should have been normal procedure regardless of the presence of Hellenic because the pilot boat and Exmouth's ultimate destination were toward the north. Continuation of a due westerly course would have caused Exmouth to run ashore in a very short time. The Captain of Exmouth, however, gave the command to come to the left. The helmsman said "You mean right, Captain" and immediately the third mate added "Yes, that's right, you will have to come to the right." The Captain, nevertheless, persisted by saying "Hard left" and the helmsman obeyed these orders. If Exmouth had turned to the right at the time the Hellenic was observed, the collision could undoubtedly have been avoided. Finally, when the vessels were but a short distance apart the Exmouth Captain ordered the helmsman to come to the right but too late to avoid collision.

The fault of Exmouth was clearly stated in the opinion of the trial court as follows: "The 'Exmouth' not only failed to keep out of the way of the 'Hellenic Beach' in clear violation of Rule 19, *supra* (33 U. S. C. sec. 204), but her master navigated her in such a faulty manner as to make the collision inevitable. There was testimony to the effect that Captain Ecklund was intoxicated during his aforementioned supervision of the navigation of the 'Exmouth' but, regardless of the cause of his faulty navigation, there appears to be no doubt that he operated the 'Exmouth' in clear violation of International Rule 19 (33 U. S. C. sec. 204)."

The trial court, however, also found that Hellenic was at fault. In his opinion he said that Hellenic "did nothing to

avoid the collision which was then so imminent" and found that she was "bound to take the necessary precautionary action to avoid the collision under the special circumstances of the situation * * *" The testimony is undisputed that Exmouth did not diminish her speed and that her navigation at the time of approaching danger was highly confused. The evidence is clear that it was Hellenic that took such actions as were possible in view of Exmouth's navigation in an endeavor to avoid a collision. The conclusion is inescapable that Exmouth was solely at fault.

Under ordinary circumstances Hellenic, as the privileged vessel, was entitled to maintain her course and speed. If Hellenic had to speculate that Exmouth would not obey the rules and engage in avoiding action on that assumption, the rules might as well be discarded. Navigation would be reduced to a game of bluff (*Wilson* v. *Pacific Mail S. S. Co.*, 276 U. S. 454; *The Delaware*, 161 U. S. 459; *National Bulk Carriers* v. *United States*, 2 Cir. 1950, 183 F. 2d 405; *Pacific-Atlantic S. S. Co.* v. *United States*, 4 Cir. 1949, 175 F. 2d 632). Exmouth's duty was well defined in *The Nereus*, 23 Fed. Rep. 448, 455, S. D. N. Y. 1885, the court saying: "A steamer bound to keep out of the way of another steamer by going to the right, * * * has no right, when under no stress of circumstances, but merely for her own convenience to give the other steamer a signal of two whistles, importing that she will go to the left, unless she can do so safely by her own navigation, without aid from the other, and without requiring the other steamer to change her course or her speed. Otherwise she would be imposing upon the latter steamer more or less of the burden and the duty of keeping out of the way, which by statute is imposed on herself."

This does not mean that the last clear chance rule strongly advanced by Exmouth is to be ignored. Its application, however, depends upon the facts. Here Exmouth had ample room and time in which to maneuver to avoid

the collision. Hellenic had every reason to believe that Exmouth would keep clear. Only when Hellenic heard Exmouth's two blasts was there any indication to the contrary. Even then it was Hellenic which reversed at full speed. Exmouth did nothing to avoid a collision although its two blasts showed consciousness of danger. Upon the facts the last clear chance rule cannot be availed of by Exmouth to create a mutual liability situation.

Exmouth and the court below rely heavily upon a case brought against American Export Lines, Inc., and Hellenic Lines, Inc., by Rivera, a seaman on the Exmouth, for injuries sustained in the collision as establishing mutual fault and liability. The trial court found as a conclusion of law that the verdict for personal injury damages in that case "is depositive [sic] of the issues, in this case." In the *Rivera* case, plaintiff, Rivera, sought judgment against Exmouth and Hellenic. Both Hellenic and Exmouth, in their *Rivera* answers, as a "separate, partial and complete defense" denied their own liability and alleged: (1) fault on the part of the co-defendant; (2) that "if any liability for such damage should be adjudged against defendant," it would be entitled to an indemnity from the other; and (3) that all liability should be borne by the other. No cross-claim or third party complaint was filed nor did the present parties treat this seaman's action as a real adversary proceeding.

The party seeking to invoke the doctrine of estoppel by judgment or collateral estoppel must show (1) that the issue which his opponent wishes to litigate has already been completely adjudicated and (2) that such adjudication was rendered in a proceeding where the two parties were adversaries. See *Geo. A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489 (1918). Neither condition is met here. In the first place the causes of action are not the same. The *Rivera* action was brought for personal injuries. The in-

stant proceeding is one for collision damage brought in admiralty. In the *Rivera* action there would have been no occasion for the application of the doctrine of Major-Minor fault or of error *in extremis*, both integral parts of the admiralty law relating to collision liability.

Furthermore, libelant cannot be deprived of litigating the hull damage issue in admiralty and in an adversary proceeding merely because a stranger to that action elected to join it as a co-defendant in a personal injury action. In the present case neither bar nor estoppel was pleaded. To the contrary the parties fully tried the case on the merits. The *Rivera* judgment only awarded personal injury damages against both defendants. *Employers Liability Ins. Co.* v. *Post & McCord*, 286 N. Y. 254 and *Yellow Cab Co. of D. C.* v. *Janson*, D. C. 1949, 179 F. 2d 54, do not provide precedent for the cross-libellant's argument that the joint *Rivera* judgment prevents further litigation of the mutual liability issue in the subsequent hull damage trial. Had either Hellenic or Exmouth sought to recover from the other its portion of the amount paid to Rivera those cases might have been authority for the proposition that the *Rivera* judgment estopped the parties from raising the issue of mutual liability but this is not such a suit. *McAfoos and Neff* v. *The Canadian Pacific Steamships, Ltd.*, 2 Cir. 1957, 243 F. 2d 270, dealt only with the question of election between admiralty and law where the issues were identical. It does not bear upon the problem here.

The parties here did not litigate *inter se* the issue of negligence in the *Rivera* case, and had no intention of doing so. In fact counsel for the Hellenic Lines, at the pre-trial conference in *Rivera*, were willing to contribute to any recovery which the seaman might be awarded, provided that if Exmouth were held fully liable in the collision suit. Hellenic would recover its contribution. And apparently one other claim was actually settled on this basis.

That the answers of both parties in the *Rivera* case sought to put the blame on the other is no bar. "* * * where

a person is injured by the concurrent negligence of two tortfeasors who are joined in one action, the fact that each of them attempts to show that the other was solely responsible for the accident or that the other alone was negligent does not make the issue of negligence res judicata in subsequent proceedings between them * * *" Restatements of Judgments § 82, comment (b). Nor does the fact that the parties had an opportunity to litigate the issue of negligence *inter se* in the *Rivera* action bar the present libel. The doctrine of collateral estoppel "*does not mean that questions which were not, but might have been raised in the former action cannot be litigated in the second action, or that the subsequent action is barred.*" (Emphasis in the original.) *Speed Products Co.* v. *Tinnerman Products*, 2 Cir., 1955, 222 F. 2d 61, 67. See also: *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591 (1948); Restatement of Judgments § 68 (1942).

Nor is Judge Leibell's decision (13 F. R. D. 27) allowing the use in the *Rivera* matter of depositions taken in the instant case, and relied on by the trial court, inconsistent with our present holding. The primary factual issues underlying the two cases were sufficiently similar to allow the use of these depositions; but the inferences to be drawn from these primary facts in the two cases and the rules of law applicable to each, present no real identity of issue so as to operate as an estoppel by judgment.

Decree reversed. The Exmouth is held solely liable and the case is remanded for further proceedings.

LUMBARD, *Circuit Judge* (concurring):

I concur in Judge Moore's opinion. I wish, however, also to record my agreement with the views of Judge Clark regarding the unwarranted delays in the course of this litigation.

CLARK, *Chief Judge* (dissenting):

Admittedly the Exmouth was navigated negligently. But admittedly, also, the Hellenic's navigators made no attempt to slow down or otherwise avoid the accident until it was too late. Perhaps the circumstances excused them, but quite clearly there was a question for the trial court whether or not the Hellenic's crew was negligent in failing sooner to take a course of action to avoid the collision. In retrospect it is apparent that when the ships were half a mile apart they were on a crossing course. This fact should have occurred to the crew of the Hellenic, for at this distance the green starboard lights of the Exmouth clearly were visible to them. Nevertheless the Hellenic continued on the same course at unabated speed. Not until the ships were less than one-quarter mile apart did the Hellenic attempt to avoid the collision by turning right and reversing engines. The court below, obviously in a much better position than we to judge the credibility of the testimony, determined that the navigator of the Hellenic depended unjustifiedly on the expected action of his opposite number and continued without slackening speed after he was or should have been aware of the danger. This is a realistic and reasonable decision on the facts and, in my opinion, requires affirmance. The conduct thus found is as bad for safety at sea as it would be for an autoist to rely on a green light at a street intersection when he sees that a crossing auto is not heeding a red light. *Lady Nelson, Ltd.* v. *Creole Petroleum Corp.*, 2 Cir., 224 F. 2d 591, 593 certiorari denied 350 U. S. 935.

In addition, the prior verdict and judgment in *Rivera* v. *American Export Lines*, Civ. No. 53-207, D. C. S. D. N. Y., May 2, 1952, clearly established the Hellenic's negligence; and that finding should be *res judicata* in this case. There, in an action for personal injuries brought against these two parties by an Exmouth seaman, he charged concurrent

negligence, which of course he had to prove, and did in getting a $90,000 verdict, paid one-half each by these defendants. Each denied its own negligence and as a second defense pleaded the other's negligence, adding, *e.g.*, "and if any liability for such damage should be adjudged against defendant, Hellenic Lines, Ltd., the defendant, Hellenic Lines, Ltd., would be entitled to indemnity from said defendant, American Export Lines, Inc., and all liability should be borne by said American Export Lines, Inc., instead of defendant, Hellenic Lines, Ltd." The issues of negligence appear to have been thoroughly explored and the absence of a formal cross pleading seems of little moment because the codefendants were obviously adverse parties. Requiring a formal cross pleading (*i.e.*, with a prayer for some relief) seems to me overtechnical when the circumstances show the issues to have been actually tried—a formality not in keeping with federal pleading, where under the well-known Rules 54(c), F. R. Civ. P., the demand for judgment is no limitation when the stage of potential default is passed.

The opinion also suggests that the issue of hull damages was not before the court and jury in the *Rivera* case and therefore neither party is estopped here. This seems to me a totally unwarranted limitation on the doctrine of collateral estoppel, for the cause of both the personal injury and the property damage was concurrent negligence which was adjudicated. Once such negligence is adjudicated, it is settled thereafter, whatever be the court where the issue is later raised or the nature of the damages there claimed. See, *e.g.*, *Little* v. *Blue Goose Motor Coach Co.*, 346 Ill. 266, 178 N. E. 496; *Fleischer* v. *Detroit Cadillac Motor Car Co.*, S. Ct., 165 N. Y. S. 245; and other cases cited in 2 Moore's Federal Practice 379, note 88 (2d Ed. 1948) and the annotation 104 A. L. R. 973. The only possible qualification is that, even if the Hellenic was negligently navigated, she still might be excused from liability under the "major-minor" fault rule in admiralty. But that was rejected—

and quite properly so—by the trial judge here, leaving collateral estoppel naturally effective and requiring the judgment rendered.

While I thus accept the district court's conclusion and judgment I am constrained to feel that the long delays in this litigation require comment. The libel itself was promptly filed within two weeks of the accident. Then ensued a period of inaction for five years and seven months until trial. Perhaps counsel had reasons not apparent to us for this delay—amounting, indeed, to nearly three years after the completion of the seaman's jury trial; but the current public concern with legal delays hardly envisages such reasons. At any rate the court took eight and one-half months for its opinion, based on findings which, it does seem, would have been fresher and clearer to it at the close of the evidence.[1] Then, for reasons not apparent, since its opinion was quite adequate,[2] the court called for proposed findings and took an additional fifteen months to make findings which summarize but do not add to the opinion. This last quite inexplicable delay in particular is of a kind which has caused us continued concern in our many decisions enforcing the civil rule for the prompt entry of judgment.[3] Another year will be consumed by the appeal. I suggest that none of us can feel proud of this record.

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[1] *Polarus S. S. Co. v. The Sandefjord*, 2 Cir. 236 F. 2d 270, 272, certiorari denied *Viriks Rederi A/S v. Polarus S. S. Co.*, 352 U. S. 982; *Hecht, Levis & Kahn, Inc. v. The President Buchanan*, 2 Cir. 236 F. 2d 627, 629; *Grace Line v. The C. Hayward Mesick*, D. C. S. D. N. Y., 150 F. Supp. 425, affirmed 2 Cir., 248 F. 2d 736.

[2] See F. R. 52(a) as amended and *Hecht, Levis & Kahn, Inc. v. The President Buchanan*, *supra* note 1, 2 Cir., 236 F. 2d 627.

[3] See, *e.g.*, *United States v. Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936; *F. & M. Schaefer Brewing Co. v. United States*, 2 Cir., 236 F. 2d 889, 893, certiorari granted *United States v. F. & M. Schaefer Brewing Co.*, 353 U. S. 907, *Matteson v. United States*, 2 Cir., 240 F. 2d 517; *Edwards v. Doctors Hospital*, 2 Cir., 242 F. 2d 888; *Repan v. American President Lines*, 2 Cir., 243 F. 2d 870.